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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

AARON MARK ZIMMERMAN,

Plaintiff-Petitioner,

-vs.-

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS And REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Appellate Division of the New York State Supreme Court, Fourth Department in *Matter Of Zimmerman* promulgate a new advertising rule prohibiting or restricting participation by attorneys in the grouped-by-practice listing of the telephone directory yellow pages?

2. Does the District Court have jurisdiction to entertain petitioner's general challenge to the constitutionality of the advertising rule promulgated in *Matter Of Zimmerman*?

3. Does the District Court have jurisdiction to entertain the petitioner's general challenge to the constitutionality of the Appellate Division's method of promulgating advertising rules?

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Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Aaron Mark Zimmerman respectfully requests that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 27, 1984.

OPINION BELOW

The opinion of the Court of Appeals and the opinion of the United States District Court (Northern District of New York) appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 27, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Appellate Division of the New York State Supreme Court, Fourth Department in *Matter Of Zimmerman* promulgate a new advertising rule prohibiting or restricting participation by attorneys in the grouped-by-practice listing of the telephone directory yellow pages?

2. Does the District Court have jurisdiction to entertain petitioner's general challenge to the constitutionality of the advertising rule promulgated in *Matter Of Zimmermon*?

3. Does the District Court have jurisdiction to entertain the petitioner's general challenge to the constitutionality of the Appellate Division's method of promulgating advertising rules?

STATEMENT OF THE CASE

SUMMARY

Aaron Zimmerman is an attorney who desires to utilize professional advertising to the extent permitted by the holdings of this Court in *Bates v. State Bar Of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977) and *In The Matter Of R.M.J.*, 445 U. S. 191, 102 S. Ct. 929, (1982).

In 1981, the New York State Appellate Division of Supreme Court, Fourth Department, censured Zimmerman for purchasing listings in the grouped-by-practice section of the telephone directory yellow pages. *Matter Of Zimmerman*, 79 AD 2d 263 (Fourth Department, 1981); appeal dismissed 53 N.Y. 2d 937, (1981); motion for leave to appeal denied, 54 N.Y. 2d 606 (1981).

Zimmerman later commenced an action in the District Court for the Northern District of New York pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343(3) & (4) and 28 U.S.C. §2201-2202.

Zimmerman asserts that in *Matter Of Zimmerman*, the Appellate Division established a new advertising rule that participation in the grouped-by-practice listings is unprofessional conduct because it implies certification as a specialist.

The basis of this assertion is that *Matter Of Zimmerman* contains specific language applicable to all attorneys, not merely Zimmerman:

> (T)he advertisement together with the description of the various categories of law, however, may leave the public with the erroneous impression that some lawyers are certified as specialists or that certification is available . . . The advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed.

Matter Of Zimmerman, supra, p. 265 (Emphasis added).

This language looks "to the future" and changes "existing conditions by making a new rule to be applied thereafter to all or some part of those subject" to the Appellate Division's jurisdiction. *D.C. Court Of Appeals v. Feldman*, 103 S. Ct. 1303, 1313 (1983); citing *Prentis v. Atlantic Coast Line*, 211 U. S. 226, 29 S. Ct. 69.

Even under the Court of Appeals' interpretation of *Matter Of Zimmerman*, a rule was enunciated requiring "experience" as a prerequisite for participation in the grouped-by-practice listings.

The Court of Appeals raised the question whether a "rule" may be promulgated as part of an adjudicatory proceeding. Petitioner submits that any realistic appraisal would answer this question in the affirmative. Thus, the District Court has jurisdiction to entertain Zimmerman's general challenge to the constitutionality of the rule (or rules) promulgated in *Matter Of Zimmerman*.

Moreover, the District Court has jurisdiction to entertain Zimmerman's general challenge to the method by which the Appellate Division promulgates advertising rules. *D.C. Court Of Appeals v. Feldman, supra.*

A. INITIATION OF DISCIPLINARY PROCEEDINGS AGAINST ZIMMERMAN FOR PARTICIPATING IN THE GROUPED-BY-PRACTICE LISTINGS OF THE YELLOW PAGES.

In the autumn of 1979, Zimmerman purchased a listing in most of the "areas of practice" available in the "Lawyers Grouped-By-Practice" section of the Syracuse, New York, telephone directory yellow pages. He was one of approximately two dozen attorneys who participated in the Syracuse Listings.

A disclaimer was published along with the grouped-by-practice listings stating:

> Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas as any other lawyers.

Disciplinary proceedings were initiated against Zimmerman by the State Office of Grievance Committees after a written inquiry by the President of the Onondaga County Bar Association. As a result,

Zimmerman was censured by the Appellate Division. *Matter Of Zimmerman, supra* .[1]

B. THE METHOD BY WHICH THE APPELLATE DIVISION REGULATES ATTORNEY ADVERTISING.

The Appellate Division has promulgated a general standard with respect to professional advertising, the essence of which is to proscribe "false", "misleading" or "deceptive" advertising. 22 N. Y. C. R. R. 1022.16(a).

The Appellate Division refuses to render formal advisory opinions and has instructed the staff of the Office of Grievance Committees not to render informal advisories. Rather, the Appellate Division relies on the adjudicatory process in "test cases" to formulate professional advertising guidelines.

Indeed, subsequent to his censure, Zimmerman submitted proposed advertisements to the Office of Grievance Committees to ascertain if they were in conformance with the general standard. At first, the Office of Grievance Committees provided him with such guidance. Then, the Office of Grievance Committees reversed itself and informed Zimmerman that it had been directed by the Appellate Division not to render "advisory opinions".[2]

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1 Petitioner takes exception to the Court of Appeals suggestion that the censure resulted, in part, from the alphabetical placement by his first name. This charge was dismissed.

2 The Appellate Division has adopted the Code of Professional Responsibility promulgated by the New York State Bar Association. However, membership in the N Y. S. B. A. is not required and the N. Y. S. B. A. is not an official arm of the Court. While the Bar Association does issue ethics opinions, its opinions are not binding on the Court.

The Appellate Division's approach to advertising is best underscored by noting its handling of mail advertisements. These must be filed in advance with the Office of Grievance Committees. Yet, neither the Office of Grievance Committees nor the Appellate Division will render an advisory opinion as to their propriety.

In the view of the Appellate Division, all lawyers should possess "inherent" knowledge whether advertising is misleading or not. As the District Court summarized:

> The Appellate Division upheld the disciplinary rule as formulated; it found that the purpose and meaning of the rule should be clear to any attorney who must make a judgment whether a particular form of advertising would be deceitful.

Actually, the Appellate Division's presumption with respect to lawyers' insight is highly unrealistic. If advertising propriety is so obvious, why then has this Court had to address advertising questions on several occasions?

Moreover, the states in which Zimmerman is admitted are at odds over the propriety of grouped-by-practice advertising. Florida, to cite an instance, apparently permits the type of advertising for which Zimmerman was censured.[3]

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3 "It is not improper for lawyers to list their names under areas of practice in which they are neither designated nor certified as long as the listing does not utilize the terms 'designated in', 'certified in' or 'qualified in' . . . Thus lawyers may list areas of practice in the yellow pages regardless of experience or educational background." "Ethics", The Florida Bar News, December, 15, 1983, p.2.

These divergent views by the various states underscore the fallacy of the New York view that lawyers should possess "inherent" knowledge of what constitutes acceptable commercial free speech.

Notwithstanding the Appellate Division's attitude, circumstances dictate that from time to time the Appellate Division has to establish specific advertising guidelines. Since the Appellate Division does not render advisory ethics opinions, guidelines for all attorneys are established by adjudicating the propriety of advertisements placed by individual attorneys. This is precisely what occurred in *Matter Of Zimmerman.*

C. THE RULE PROMULGATED BY *MATTER OF ZIMMERMAN* THAT PARTICIPATION IN THE GROUPED-BY-PRACTICE LISTINGS IS IMPROPER BECAUSE IT IMPLIES SPECIALIST STATUS.

For the language in *Matter Of Zimmerman* to be accurately characterized as a "rule", it must (a) "loo(k) to the future", (b) "chang(e) existing conditions" and (c) "be applied thereafter to all" attorneys. *D.C. Court Of Appeals v. Feldman, supra,* 1313.

Concededly, *Matter Of Zimmerman* is not a model of clarity. The Appellate Division cited both a lack of experience and the implication conveyed of "specialist" status in support of its determination that the listings were misleading.

It is clear, however, that *Matter Of Zimmerman* did look to the future; did change existing conditions; and is applicable to all attorneys.

When the Appellate Division addressed the matter of "specialist" status, the Court referred to <u>all of the lawyers in the listings, not merely Zimmerman</u>:

> (T)he advertisement together with the description of the various categories of law, however, may leave the public with the erroneous impression that some <u>lawyers</u> are <u>certified as specialists</u> or

> that certification is available . . . The advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed.

Matter Of Zimmerman, supra, p. 265, (Emphasis added).[4]

The Appellate Division's statement in *Matter Of Zimmerman* reflects the fact that in New York, it is, per se, improper for an attorney to hold himself or herself out to the public as being a "specialist". [See Opinion #487, Committee On Professional Ethics, New York State Bar Association (July 10, 1978)].

Thus, by virtue of the Appellate Division's statement every attorney listed in the grouped-by-practice listings could thereafter by subject to disciplinary action.

The conclusion is, therefore, inescapable that by its holding in *Matter Of Zimmerman, supra,* the Appellate Division established a new advertising rule that participation in the grouped-by-practice listings is per se misleading because it implies "specialist" status.

D. AT THE VERY LEAST, *MATTER OF ZIMMERMAN* ESTABLISHED A RULE REQUIRING "EXPERIENCE" TO PARTICIPATE IN THE GROUPED-BY-PRACTICE LISTINGS.

The Second Circuit Court of Appeals refused to adopt the petitioner's line of analysis contending that *Matter Of Zimmerman* promulgated a rule applicable to all lawyers prohibiting participation in the

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4 The District Court itself characterized the grouped-by-practice listings as: ". . . 25 areas of specialization for lawyers." (Emphasis added)

grouped-by-practice listings because they implied certification as a specialist. However, at the very same time the Court of Appeals noted:

> The Court censured Zimmerman because he listed himself under categories for which he lacked experience . . .

Given the Appellate Division's "test case" procedure, even under this interpretation *Matter Of Zimmerman* established an advertising rule: A lawyer must be "experienced" to participate in the listings.

Either way, *Matter Of Zimmerman* looked to the future conduct of all attorneys. As such, it may be characterized as a "rule" and its constitutionality is open to challenge in the District Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS HAS MISCONSTRUED AND MISAPPLIED THE HOLDING OF THIS COURT IN *D.C. COURT OF APPEALS* v. *FELDMAN*, AND RAISES SIGNIFICANT ISSUES WITH RESPECT TO DISTRICT COURT JURISDICTION IN ATTORNEY CONDUCT CASES.

This Court has already established that the district courts may entertain general challenges to rules promulgated by state courts regarding attorney conduct. *Supreme Court Of Virginia* v. *Consumers Union*, 446 U.S. 719, 100 S. Ct. 1967 (1980); *D.C. Court Of Appeals* v. *Feldman*, *supra*.

The petitioner contends that your holdings in *Consumers Union*, *supra* and *Feldman*, *supra* are equally applicable to the situation in which a state court promulgates a rule regarding conduct through the adjudicatory process. This must be so if attorneys in jurisdictions which utilize New York's "test case" approach are not to be foreclosed from the avenue of relief accorded by *Feldman*.

The Court of Appeals alluded to this issue, but saw no need to resolve it:

> It is possible that a state court could combine in a single opinion an adjudication of a grievance complaint with a promulgation of what amounts to a new rule . . . (I)f . . . the Appellate Division . . . had gone on to annouce a prohibition of any grouped-by-practice listing, we would have to determine whether *Feldman* permits a district court challenge to such a claimed 'promulgation' of a new rule.

The Court of Appeals avoided this threshold issue by imposing the additional requirement not mandated by *Feldman* that the pronouncement of the state court be rendered with crystal clarity:

> It would be inconsistent with the thrust of *Feldman* to resolve ambiguities in a state court opinion in favor of the 'promulgation' of a 'new' rule and thereby encounter a jurisdictional issue in the absence of a clear statement from the state court.

This is an erroneous interpretation of *Feldman*. There is no reason why the attorney making the challenge should be foreclosed from relief simply because the state court's statement lacks total clarity.

The language contained in *Matter Of Zimmerman* possesses all the attributes of a "rule": it looks to the future; it changes existing conditions; and it is applicable to all attorneys. *D.C. Court Of Appeals v. Feldman, supra*, p. 1313.

For the Court of Appeals' analysis to be sustained, it must be demonstrated that the Appellate Division merely investigated, declared and enforced "liabilities as they stood on present or past facts and under laws supposed already to exist". *D.C. Court Of Appeals v. Feldman, supra*, p. 1313.

This was clearly not the case in *Matter of Zimmerman*.

Any fair reading must lead to the conclusion that *Matter Of Zimmerman* imposed new limitations on attorney advertising by restricting - if not prohibiting - participation by all attorneys in the grouped-by-practice listings. These limitations may be challenged by Zimmerman or any other attorney under your holding in *Feldman.*

Moreover, the Court of Appeals ignored the petitioner's challenge to the method by which the Appellate Division promulgates advertising guidelines. *Feldman* certainly does not foreclose such a constitutional challenge.

The utilization of "test cases" by the Appellate Division to establish advertising guidelines results in a (1) chilling effect upon advertising; (2) an unfair selective enforcement against individual attorneys and (3) an unconstitutional ex post facto application of rules. The District Court has jurisdiction to entertain a general challenge to the constitutionality of this method by which the Appellate Division establishes advertising guidelines.

These are all significant issues meriting the attention of this Court.

2. THE DECISION OF THE COURT OF APPEALS INVOLVES AN IMPORTANT CONSTITUTIONAL ISSUE.

The decision below has foreclosed the petitioner from challenging the advertising restrictions promulgated by *Matter Of Zimmerman* as they apply to his future advertising and that of other attorneys.

Matter Of Zimmerman cannot stand constitutional muster in light of the subsequent holding of this Court in *Matter Of R.M.J., supra.*

An attorney need not be "experienced" or a "specialist" to advertise that he or she will accept a case in certain areas of practice. The attorney need only be

"competent". This is the essence of your holding in *Matter Of R.M.J., supra,* p. 937:

> The states may not place an absolute prohibition on certain types of potentially misleading information, e.g. a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. (Emphasis added)

Whether premised on the "experience" theory or the "specialist-status" theory, the restrictions promulgated by *Matter Of Zimmerman* are facially unconstitutional.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

A1

Decision of The Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FEB - 6 1984

No. 455—August Term, 1983

Argued: January 5, 1984 Decided: January 27, 1984

Docket No. 83-7532

AARON MARK ZIMMERMAN,

Plaintiff-Appellant,

—v.—

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK, ET AL.,

Defendant-Appellee.

Before:

NEWMAN and PRATT, *Circuit Judges*, and MACMAHON, *District Judge.**

* The Honorable Lloyd F. MacMahon of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the District Court for the Western District of New York (Neal McCurn, Judge) dismissing for lack of subject matter jurisdiction a suit challenging a state court's censure of a lawyer and construction of a Disciplinary Rule of the Code of Professional Responsibility barring deceptive and misleading lawyer advertising.

Affirmed.

GARY LAVINE, Syracuse, N.Y. (Aaron Mark Zimmerman, *pro se*, Syracuse, N.Y., Mark Bennett, Allen, Babisch & Bennett, Des Moines, Iowa, on the brief), *for plaintiff-appellant.*

WILLIAM J. KOGAN, Asst. Solicitor General, Albany, N.Y. (Robert Abrams, Attorney General, and Peter H. Schiff, Albany, N.Y., on the brief), *for defendant-appellee Grievance Committee of the Fifth Judicial District.*

JOHN A. WILLIAMSON, JR., Albany, N.Y., *for defendant-appellee New York State Bar Association.*

HENRY S. FRASER, Syracuse, N.Y. (Coulter, Fraser, Ames, Bolton, Bird & Ventre, Syracuse, N.Y., on the brief), *for defendant-appellee Onondaga County Bar Association.*

NEWMAN, *Circuit Judge*:

Aaron Mark Zimmerman appeals from the June 13, 1983, judgment of the District Court for the Western District of New York (Neal McCurn, Judge) dismissing his amended complaint for lack of subject matter jurisdiction. The complaint alleged that Zimmerman's First Amendment rights were violated by a decision of the Appellate Division of the New York Supreme Court, which censured him for violating a State rule regulating lawyer advertising. We affirm.

Zimmerman, an attorney admitted to practice in New York, purchased listings in the attorneys' section of the Syracuse, New York, *Yellow Pages*. His name, arranged alphabetically by his first name, rather than by his surname, appeared in all of the twenty-five available areas of practice listed under a general caption "LAWYERS Grouped By Practice." Among the areas in which Zimmerman was listed were "Admiralty Law," "Bankruptcy," "Labor Law," and "Securities Law."

The Grievance Committee of New York's Fifth Judicial District instituted disciplinary proceedings against Zimmerman before the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. The Committee alleged that Zimmerman had violated the advertising rule in 11 N.Y.C.R.R. § 1022.16(a), which adopts DR 2-101(A) of the Disciplinary Rules of the Code of Professional Responsibility.[1] The Appellate Division issued a decision and order censuring Zimmerman for professional misconduct. *In re Zimmerman*, 79

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[1] The rule provides: "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole."

A.D.2d 263, 438 N.Y.S.2d 400 (4th Dep't 1981) (per curiam). Zimmerman's appeal to the New York Court of Appeals was dismissed. 53 N.Y.2d 937, 440 N.Y.S. 2d 1029 (1981), and a subsequent motion for leave to appeal was denied, 54 N.Y.2d 606, 443 N.Y.S.2d 1029 (1981). Zimmerman did not seek review in the United States Supreme Court, but instead instituted the present action in federal district court, purporting to plead various claims under 42 U.S.C. § 1983 (Supp. V 1981).

We agree with the District Court's determination that *District of Columbia Court of Appeals v. Feldman*, 103 S. Ct. 1303 (1983), requires dismissal of Zimmerman's amended complaint for lack of subject matter jurisdiction. *Feldman* held that a federal court lacks subject matter jurisdiction over claims that an unsuccessful state bar applicant was subjected to an unconstitutional application of state bar admission rules in a state judicial proceeding. *Id.* at 1311-15. The only permissible federal court challenge is review in the United States Supreme Court. 28 U.S.C. § 1257 (1976). The decision in *Feldman* clearly applies to federal district court challenges to attorney disciplinary orders rendered by state courts in judicial proceedings. *See* 103 S. Ct. at 1314 n.15; *id.* at 1315-16 n.16 (citing *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969)). Disciplinary proceedings before the New York Appellate Division are judicial in nature, *Erdmann v. Stevens*, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), and dismissal of an appeal from a disciplinary proceeding by the New York Court of Appeals is a final state court judgment. *See Turco v. Monroe County Bar Association*, 554 F.2d 515, 521 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

Apparently recognizing that *Feldman* precludes a district court challenge to the censure itself, Zimmerman

endeavors on appeal to broaden his challenge to include what he claims is "a general attack upon the constitutionality of the rule." Appellant's Brief at 7. *Feldman* recognized a distinction between "challenges to state court decisions in particular cases arising out of judicial proceedings," over which district courts lack jurisdiction, and "general challenges to state bar rules, promulgated by state courts in non-judicial proceedings," as to which district court jurisdiction exists. 103 S. Ct. at 1317. And the Supreme Court acknowledged in *Feldman* that a state court may be found to have acted in a non-judicial capacity in promulgating rules regulating the bar. *Id.* at 1316; *see, e.g., Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). It is possible that a state court could combine in a single opinion an adjudication of a grievance complaint with a promulgation of what amounts to a new rule. Of course, every application of a rule to the facts of a particular case results in some "new" refinement of the rule, and *Feldman* cannot be circumvented by characterizing all constructions of a rule as the promulgation of new rules. Thus, when Zimmerman challenges the Appellate Division's decision because it construed the advertising rule's ban on "deceptive" and "misleading" statements to bar any listings under categories in which a lawyer is not experienced, he is complaining about a construction of the rule given in an adjudication of the grievance against him, and *Feldman* limits his challenge of that adjudication to review in the Supreme Court. However, if, as Zimmerman contends, the Appellate Division, after finding Zimmerman's listings to be deceptive because they implied experience that he lacked, had gone on to announce a prohibition on any grouped-by-practice listing, we would have to determine

whether *Feldman* permits a district court challenge to such a claimed "promulgation" of a "new" rule.

We need not resolve that issue in this case, however, because the Appellate Division has not unambiguously prohibited grouped-by-practice listings. The Court's opinion only raises the concern that listing by categories of law "*may* leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists" and notes that "no lawyer certifications procedure or rules have been established in New York." 438 N.Y.S.2d at 402 (emphasis added). But the opinion stops short of announcing a prohibition on grouped-by-practice listing. The Court censured Zimmerman because he listed himself under categories for which he lacked experience, not because of a listing *per se*. The Assistant Solicitor General of New York, representing the Grievance Committee, eschews any contention that grouped-by-practice listings have been prohibited. It would be inconsistent with the thrust of *Feldman* to resolve ambiguities in a state court opinion in favor of the "promulgation" of a "new" rule and thereby encounter a jurisdictional issue in the absence of a clear statement from the state court.

Affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AARON MARK ZIMMERMAN,

Plaintiff,

-vs.-

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS, AND REID S. MOULE, ALL INDIVIDUALLY AND JOINTLY IN THEIR CAPACITIES AS JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH JUDICIAL DEPARTMENT; THE ONONDAGA COUNTY BAR ASSOCIATION; AND THE NEW YORK STATE BAR ASSOCIATION,

Defendants.

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MEMORANDUM-DECISION & ORDER

Plaintiff Aaron Mark Zimmerman brought this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Plaintiff seeks declaratory and injunctive relief from the decision of the Supreme Court of the State of New York, Appellate Division, Fourth Department to censure him for violation of the relevant rule regarding attorney advertising, DR 2-101(A) of the Disciplinary Rules of the Code of Professional Responsibility, adopted by New York at 22 N.Y.C.R.R. § 1022.16(a).

Before the Court is defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b) on the grounds that the amended complaint fails to state a claim upon which relief can be granted and that the Court lacks subject matter jurisdiction. The Court grants defendants' motion pursuant to Rule 12(b) (1) on the basis that jurisdiction does not lie in a federal district court, for the reasons set forth below.

BACKGROUND

Plaintiff Zimmerman was admitted to the New York bar in 1977. In 1979, he caused his name to be listed in the New York Telephone yellow pages directory for the Syracuse area under each of the available 25 areas of specialization for lawyers. His name was arranged alphabetically by his first name, rather than by his surname. Under the caption "Lawyers Grouped by Practice" was the following disclaimer: "Lawyers listing areas of practice in the yellow pages have not necessarily been certified by any State or Federal authorities as having any more competence in these areas than any other lawyers."

As a result of this advertising, the New York Fifth Judicial District's Grievance Committee instituted disciplinary proceedings against Zimmerman before the Fourth Department. It was the Committee's position that Zimmerman had violated the advertising rule found at 22 N.Y.C.R.R. 1022.16(a). The rule provides:

> A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.

The Fourth Department considered the contentions of Zimmerman that he had no intention to deceive when he advertised in the manner that he did and that the disciplinary rule was vague and overbroad. The court found that Zimmerman's advertising was not protected speech because of its capacity to deceive, holding that it did not "disclose information to permit a consumer to reach an informed decision." *Zimmerman v. Office of Grievance Committees,* 79 A.D.2d 263, 265, 438 N.Y.S.2d 400, 402 (4th Dep't 1981), *appeal dismissed,* 53 N.Y.2d 937, 440 N.Y.S.2d 1029 (1982). Further, the Appellate Division upheld the disciplinary rule as formulated; it found that the purpose and meaning of the rule should be clear to any attorney

who must make a judgment as to whether a particular form of advertising would be deceitful. Zimmerman was therefore censured for using deceptive and misleading advertising. *Id.* at 266, 438 N.Y.S.2d at 403.

Zimmerman's appeal to the New York Court of Appeals was dismissed. *Matter of Zimmerman*, 53 N.Y.2d 937, 440 N.Y.S.2d 1029 (1981). Thereafter, Zimmerman brought the instant action in federal district court. After defendants filed the current motions to dismiss, plaintiff filed an amended complaint. Argument of the motion was directed to the amended complaint.

DISCUSSION

In *District of Columbia Court of Appeals* v. *Feldman*, ____U.S.____, 103 S. Ct. 1030 (1983), the Supreme Court determined that a district court has no power to review a decision of the highest court of a state regarding a particular lawyer's discipline. In its opinion, the Court noted that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the Supreme] Court." 103 S. Ct. at 1315. See 28 U.S.C. § 1257.

Zimmerman was disciplined in a proceeding that was judicial in nature. *See District of Columbia Court of Appeals*, 103 S. Ct. at 1313. *See also, Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, ____U.S.____, 102 S. Ct. 2515, 2522 (1982) (when the state vests in its courts the power to discipline lawyers, disciplinary proceedings are judicial, not administrative or legislative); *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (Appellate Division "act[s] in its judicial capacity as a state court in . . . disciplinary proceedings . . . and . . . these proceedings are judicial, not administrative, in nature.") In addition, there is no question that the dismissal of Zimmerman's appeal by the New York Court of Appeals represents a final state court judgment.

See Turco v. Monroe County Bar Ass'n, 554 F.2d 521 (2d Cir. 1977).

The Supreme Court has recognized the traditional strong interest of a state to regulate the conduct of lawyers admitted to its bar. *See District of Columbia Court of Appeals*, 103 S. Ct. at 1315 n.16; *Middlesex County Ethics Comm.*, 102 S. Ct. at 2522. The rule that permits state court judgments in this area to be reviewed only by the Supreme Court "serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems." *District of Columbia Court of Appeals*, 103 S. Ct. at 1316 n.16, quoting *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969).

Only when a litigant "mount[s] a general challenge to the constitutionality" of a disciplinary rule does a federal district court have jurisdiction. *District of Columbia Court of Appeals*, 103 S. Ct. at 1316. When state courts promulgate rules regarding attorney conduct, they act in a nonjudicial capacity, and hence, district courts may consider the constitutionality of those rules. *Id.* at 1317, citing *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731, 100 S. Ct. 1967, 1974 (1980).

The Supreme Court, in distinguishing between a particularized and a generalized attack on a state bar rule, quoted a Tenth Circuit decision which stated, in pertinent part:

> There is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power

> to license attorneys involving challenges to either the rule-making authority or the administration of the rules, . . . such is not true where review of a state court's adjudication of a particular application is sought. The Court rules that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States.

District of Columbia Court of Appeals, 103 S. Ct. at 1316, quoting *Doe v. Pringle,* 550 F.2d 596, (10th Cir. 1976) (emphasis in original).

A close examination of plaintiff's amended complaint discloses that the subject matter complained of concerns a particular lawyer's discipline for violation of a rule of conduct rather than a generalized attack on the constitutionality of the rule.

Plaintiff asserts in the first, fifth, and sixth causes of action that the defendants have infringed upon his first amendment rights to engage in commercial speech through advertising; in his second cause of action that he was denied equal protection under the fourteenth amendment in that other attorneys who advertised in a similar manner were not disciplined; in his third and fourth causes of action that he was denied due process in that he was held to an unknown standard of conduct, in that the complaint was first brought to the Grievance Committee by a member of the local bar association who was biased against him, and in that the Grievance Committee failed to give him guidance on the proper manner of advertising when he requested it.

For relief, plaintiff requests a judgment declaring that the defendants' actions violated plaintiff's constitutionally protected right to advertise and an injunction preventing defendants from further violations of his first amendment rights. Clearly, what plaintiff seeks is a review of New York's final judgment that his actions deserved censure. It cannot be said that contained within the complaint is a general challenge to 22 N.Y.C.R.R. 1022.16(a).

Although Zimmerman brings this action under Title 42, Section 1983 for protection of federal constitutional rights, this court may not entertain his complaint. As stated in *District of Columbia Court of Appeals:*

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

103 S. Ct. at 1315 n.16. When a plaintiff seeks review of a state court judgment that results in his discipline, even when he asserts violations of federal rights, his appeal may be only to the Supreme Court. *Id.* at 1317. Zimmerman's allegations that the judgment in state court resulted in constitutional deprivations are bound up with his assertions that he was improperly disciplined, and accordingly this court lacks jurisdiction.

Defendants' motion to dismiss is hereby granted on the basis that there is no subject matter jurisdiction. In reaching this decision, the court need not address the other basis for defendants' motion.

For the foregoing reasons, defendants' motion to dismiss plaintiff's amended complaint is granted pursuant to Fed. R. Civ. P. 12(b) (1).

IT IS SO ORDERED.

NEAL P. McCURN
Neal P. McCurn, U.S. District Judge

Dated: June 8, 1983
Syracuse, New York

Office - Supreme Court, U.S.
FILED
MAY 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1780

IN THE

Supreme Court of the United States

October Term, 1983

AARON MARK ZIMMERMAN,
Plaintiff-Petitioner,

v.

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS and REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,
Defendants-Respondents.

Brief for Respondent Grievance Committee and Justices in Opposition to Granting a Petition for a Writ of Certiorari

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Assistant Solicitor General
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Dated: May 9, 1984

Question Presented for Review.

Whether the discipline of the petitioner by the Appellate Division of the Supreme Court of the State of New York was properly considered to be a judicial proceeding, the final determination in which is not within the subject matter jurisdiction of a Federal district court and is thus not reviewable by that court.

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No. 83-1780

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

AARON MARK ZIMMERMAN,

Plaintiff-Petitioner,

v.

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS and REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,

Defendants-Respondents.

Brief for Respondent Grievance Committee and Justices in Opposition to Granting a Petition for a Writ of Certiorari.

Opinion of the Court of Appeals.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 726 F2d 85.

Statement of the Case.

The petitioner was admitted to practice law in the State of New York in 1977. Because he conducts his law practice in Onondaga County, New York, his professional conduct is subject to oversight by the Grievance Committee of the Fifth Judicial District of the State of New York, and to review by the New York Supreme Court, Appellate Division, Fourth Judicial Department.

In the autumn of 1979, petitioner contracted for the listing of his name in the attorneys' section of the "yellow pages" in the Syracuse telephone directory. He purchased a listing of his name in every one of the 25 available law practice categories. He had his name listed by his given name first, rather than by his surname, as is customary.

On or about December 1, 1980, the Grievance Committee, in response to a written inquiry concerning petitioner's advertising from the president of the Onondaga County Bar Association commenced a disciplinary proceeding in the Appellate Division.* The court, based on a finding that such a listing conveys the impression of expertise, whereas petitioner conceded the absence of any experience in most of the areas, found that the listings were in violation of the advertising provision in its code of professional responsibility and imposed a punishment of censure.** Petitioner's appeal to the New York Court of Appeals taken as of right was dismissed "upon the ground that no substantial constitutional question is directly involved".

*Authorized by New York Judiciary Law, § 90.

***In the Matter of Aaron Mark Zimmerman*, 79 AD2d 263, 438 NYS2d 400 (1981). (Copy appended.)

53 NY2d 937, 440 NYS2d 1029 (1981). His motion for leave to appeal was denied as well. 54 NY2d 606 (1981).

The petitioner thereafter commenced this action, purporting to plead claims under 42 USC § 1983, in February, 1982. The amended complaint, in the first, fifth and sixth causes of action, alleges that certain actions of the defendants deprived him of First Amendment rights; in the second cause of action, alleges selective prosecution; in the third cause of action, alleges that he was unreasonably held to a standard of conduct prior to its promulgation; and in the fourth cause of action, alleges that the merits of the complaint against him had been prejudged. For relief, he asked for a declaration "that the actions of the Defendants complained of herein are unconstitutional", together with an injunction preventing further violation of his rights.

In the District Court, Judge McCurn pointed to the above-mentioned aspects of the complaint, held that it "cannot be said that contained within the complaint is a general challenge to 22 NYCRR 1022.16(a)", and concluded:

> "Zimmerman's allegation that the judgment in state court resulted in constitutional derprivations are bound up with his assertions that he was improperly disciplined, and accordingly, this court lacks jurisdiction."

The Court of Appeals agreed with the District Court's determination that the complaint must be dismissed for lack of subject matter jurisdiction. The Court of Appeals noted that disciplinary proceedings before the New York Appellate Division are judicial in nature. The court rejected petitioner's characterization of the Appellate Division action as rule making, holding that "he is complaining about a construction of the rule given in an adjudication of the grievance against him." The decision notes that

the Appellate Division did not ban grouped-by-practice listings, but only found petitioner guilty of a deception because his listing implied experience which he lacked.

Reason for Denying the Writ.

Since the allegations of the amended complaint seek review by the District Court of a judicial decision of the Appellate Division, the courts below properly concluded that they lacked jurisdiction of the subject matter.

The petitioner was censured by the Appellate Division because that court found that by listing his name in each and every one (rather than "most" as he claims)* of the practice categories in the Syracuse telephone directory yellow pages, "the potential for deception was created by the advertisement and respondent's listings were deceptive and misleading." *In re Zimmerman,* 79 AD2d 263, 266, 438 NYS2d 400, 403. The censure was based upon a pre-existing duly promulgated rule of that court which states, in part:

> "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole."**

*Petitioner's brief, page 4.

**22 NYCRR § 1022.16; see, also, McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, §§ 500 to end. Unlike the decision, which petitioner would have the courts denominate a rule, this duly promulgated rule, as well as others of the court, appears in the official compilation of Codes, Rules and Regulations of the State of New York. The same text may be found in the American Bar Association Code of Professional Responsibility, DRZ-101(a), adopted by the New York State Bar Association and set forth in the appendix to the New York Judiciary Law published as part of McKinney's Consolidated Laws of New York.

Thus, what petitioner is aggrieved by is the court's judicial interpretation and application of the language of the rule in the context of the facts of his case. He does not attack the rule itself.* His challenge, as found by both courts below, was to a judicial holding that where an attorney has his name listed in every one of 25 specialty categories, he has created a situation likely to lead a prospective client into believing that he possesses expertise in all those categories. When, as he admits, he does not possess that expertise, he is guilty of deception.

In recognition of the obvious fact that the court's action was a decision, petitioner sought to appeal to the New York Court of Appeals. As noted above, both his appeal taken as of right, and his motion for leave to appeal, were rejected. This constituted a final state court judgment in a judicial proceeding. See *Turco v. Monroe County Bar Association,* 554 F2d 515, 521 (2d Cir, 1977), cert den 434 US 834 (1977); *Erdmann v. Stevens,* 458 F2d 1205, 1208-9 (2d Cir, 1972), cert den 409 US 889 (1972). Plainly, petitioner's only avenue to this Court was to petition for certiorari in the State court proceeding, but that he did not do. He should not now be heard to call a decision a rule merely because he finds his Federal action barred by the principle enunciated by this Court in *District of Columbia Court of Appeals v. Feldman,* ____ US ____, 103 S Ct 1303 (1983).

Insofar as petitioner argues that the language of the Appellate Division decision creates a rule because it may be applicable to others, obviously the same can be said for any judicial decision which has precedential value. That alone does not diminish or alter its status as a judicial decision. The test enunciated in *District of Columbia Court of Appeals (supra)* and in *Prentis v. Atlantic Coast Line,* 211

*While petitioner attempts to argue the merits of the Appellate Division decision, that is not before this Court. That a state may bar deceitful advertising, as provided in the rule at bar, is beyond cavil. *In re R.M.J.,* 455 US 191 (1982); *Bates v. State Bar of Arizona,* 433 US 350 (1977).

US 210 (1908) is that in a judicial function the court investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is what the Appellate Division did in finding that the listings in question violated the existing regulation. Moreover, what the decision held is common sense, which often makes good law. *Peak v. United States,* 353 US 43, 46 (1957). It did not then purport to promulgate a rule, and it was properly found to be beyond the subject matter jurisdiction of the Federal judiciary.

CONCLUSION.

Petitioner's application for a writ of certiorari should be denied.

Dated: Albany, New York
May 3, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Grievance Committee and Justices
of the Appellate Division

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

WILLIAM J. KOGAN
Assistant Solicitor General
of Counsel

APPENDIX.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to practice as an attorney and counselor at law in the State of New York on September 12, 1977. The Grievance Committee for the Fifth Judicial District charged in its petition instituting this disciplinary proceeding that respondent advertised in the Yellow Pages of the New York Bell Telephone Directory for Syracuse, New York for the year 1980-1981 that he practiced in each of the 25 areas of law listed alphabetically in the advertisement which appeared under the caption "Lawyers Grouped by Practice" and that this conduct appears to violate DR 2-101(A) of the Code of Professional Responsibility and subdivision (a) of rule 1022.16 of the Appellate Division, Fourth Department (22 NYCRR 1022.16[a]). According to the petition, respondent admitted that "he has had no experience at all in several of these categories of law".

By this answer respondent admitted the material allegations of the petition, but denied that he either intended to violate or, in fact, violated the Code of Professional Responsibility. Respondent's answer details the methods adopted by the telephone company in obtaining his listing in the "various categories where he was willing to accept clients who came to him with problems", and asserts that he is associated with a well-established law firm to whom he could turn for assistance and that at the time he purchased the advertisement he did not feel that his conduct was improper. He claims that the guidelines and rules set forth in DR 2-101(A) are "vague, ill-defined", and that he had no intention to mislead or deceive. The parties conceded that no order of reference was required.

We find that respondent violated DR 2-101(A) of the Code of Professional Responsibility and the rules of this department (22 NYCRR 1022.16[a]).

DR 2-101(A) of the Code of Professional Responsibility provides: "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole." Our department rule, effective March 1, 1978 entitled "Advertising by attorneys", is identical to DR 2-101(A).

An examination of the advertisement, a copy of which is attached to the petition and annexed hereto as Appendix A, reveals that its publisher divided the practice of law into 25 separate categories under each of which respondent's name appears first: his name is listed alphabetically by his given name, Aaron, rather than by his surname, Zimmerman. Under the advertisement's caption appears the following legend: "Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas than any other lawyers".

Commercial speech in the form of truthful advertising of legal services, designed to disclose information to permit a consumer to reach an informed decision and to identify the legal services he desires, serves individual and societal interests and while it may be regulated by the State it may not be proscribed (*Bates v State Bar of Arizona*, 433 US 350; see, also, *Matter of Primus*, 436 US 412; *Matter of Koffler*, 51 NY2d 140). Further, a lawyer is permitted publicly to identify one or more areas of law in which he practices, but he may not hold himself out as a specialist in a particular field of law, since no lawyer certification procedure or rules have been established in New York State (Code of Professional Responsibility, DR 2-105).

The advertisement itself makes no overt claim as to the quality of legal services that may be provided. The ambiguous caveat or disclaimer of the advertisement together

with the description of the various categories of law, however, may leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists or that certification is available. Read as a whole, it cannot be gainsaid that the advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed. If the purpose of the advertisement is to permit a consumer to reach an informed and reliable decision and identify the legal provider for the legal services he desires, which is a legitimate aim, this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed. Respondent's claim that he is associated with a well-established law firm which can assist him is of no avail because it is his listing, not that of his law firm, which is under review. This claim merely emphasizes the deceptive and misleading nature of the entire advertisement since it is he, not his law firm, who is holding himself out to the public.

The disciplinary rule under review is directly concerned with the prevention of deception: a legitimate State interest which the regulation seeks to protect. The thrust of the regulation is honest public communication so that "the stream of commercial information [may] flow cleanly as well as freely" *(Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748, 772). No detailed guideline or signpost other than an innate sense of right or wrong should be necessary to achieve this goal. A lawyer, particularly, should have an awareness of the moral quality of his own conduct and the ability to make the obvious judgment that the design of such an advertisement is to gain clients by guile and delusion. Measuring the conduct of the respondent against the plain and obvious meaning and intent of the regulation, we conclude that the potential for deception was created by the advertisment and respondent's listings were deceptive and misleading. The holding by the Court

of Appeals in *Matter of Koffler* (51 NY2d 140, *supra)* does not require a contrary conclusion. There it was held that direct-mail solicitation of potential clients is constitutionally protected commercial speech. We hold here that commercial speech must be honest and truthful, and prospective clients should not be beguiled or deceived by the content or the subject matter of the public utterance. Respondent's conduct subverted the true purpose of permitted advertising by lawyers and no prior sanction should be required to insure complete honesty and truthfulness by lawyers in all of their utterances, public or otherwise, to prospective clients. Because of respondent's youth, his disclaimer of any intent to mislead or deceive, and his naiveté in relying on the assurances of the printers of the advertisement as to the propriety of the listings, he should not be disbarred or suspended but should be censured.

DILLON, P. J., CALLAHAN, DOERR, DENMAN and SCHNEPP, JJ., concur.

Motion to strike paragraph ninth of the petition granted. Order of censure entered.

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Defendants-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT NEW YORK STATE BAR ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF RESPONDENT NEW YORK STATE BAR ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Was the District Court's dismissal of the case properly affirmed by the Court of Appeals for the Second Circuit?

STATEMENT OF THE CASE

The instant proceeding is a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and order of that court, dated January 27, 1984, affirming the judgment, dated June 8, 1983, of the District Court for the Northern District of New York dismissing the action brought by Petitioner Zimmerman.

Zimmerman, an attorney admitted in 1977 to practice law in New York State, in 1979 listed himself in the Yellow Pages of the Syracuse area New York telephone directory under each of twenty-five available categories of legal practice. Such listing appeared under the caption, "Lawyers Grouped by Practice."

As a result of this advertising, disciplinary proceedings were instituted against Zimmerman by the Grievance Committee of the Fifth Judicial District before the Supreme Court of the State of New York, Appellate Division, Fourth Department, for violation of the appropriate rule governing attorney advertising as set forth in 22 N.Y.C.R.R. 1022.16(a) and DR 2-101(A) of the Lawyer's Code of Professional Responsibility. The Appellate Division thereafter issued a decision and order censuring Zimmerman for professional misconduct. The decision was formally reported at 79 A.D. 2d 263 (1981). An appeal to the New York Court of Appeals was then dismissed, 53 N.Y. 2d 937 (*mem.* 1981), with a further motion for leave to appeal denied, 54 N.Y. 2d 606 (*mem.* 1981).

Zimmerman then instituted an action in United States District Court for the Northern District of New York pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331 seeking declaratory and injunctive relief from the decision and order of the Appellate Division, Fourth Department. Joined as defendants were the Grievance Committee of the Fifth Judicial District, the Onondaga County Bar Association and the New York State Bar Association. Motions to dismiss were filed by counsel for all defendants and were granted pursuant to Fed. R. Civ. P. 12(b)(1) by the District Court. The decision and order of the District Court, dated June 8, 1983, are set forth at pages A7-A13 of the appendix to Zimmerman's petition.

Zimmerman subsequently appealed said decision and order of

the District Court to the United States Court of Appeals for the Second Circuit. By decision of January 27, 1984, the Court of Appeals affirmed the lower court ruling (appendix to petition pp. A1-A6), giving rise to the instant petition by Zimmerman for a writ of certiorari.

SUMMARY OF ARGUMENT

The District Court properly dismissed Zimmerman's action for want of subject matter jurisdiction, in accordance with the decision in *District of Columbia Court of Appeals v. Feldman*, —U.S.—, 103 S. Ct. 1303 (1983). The District Court fairly determined that Zimmerman's complaint centered upon a particular lawyer's discipline for violation of the applicable rules governing attorney advertising rather than a generalized attack on the constitutionality of the rules. This dismissal was properly affirmed by the United States Court of Appeals for the Second Circuit. It is respectfully submitted, therefore, that no basis exists for the granting of certiorari pursuant to 28 U.S.C. §1254 and the considerations set forth in Rule 17 of this Court.

ARGUMENT

While Zimmerman has set forth three questions at page 2 of his petition, it is submitted these can be reduced to a single issue: Was the matter correctly decided by the District Court and affirmed by the Court of Appeals? It is respectfully submitted that this question may be answered in the affirmative.

As noted in the decision of the Court of Appeals (at A5 of Zimmerman's appendix to the petition), at the appellate level Zimmerman has endeavored to broaden his challenge to include a general attack upon the constitutionality of the rule governing lawyer advertising in New York. However, as indicated by the Court of Appeals, this case is actually concerned with a challenge to a state court decision in a particular case, rather than a general challenge to the New York rule governing lawyer advertising as contained in 22 N.Y.C.R.R. 1022.16(a) and DR 2-101(A) of the Code of Professional Responsibility.

Zimmerman in essence is contending that the Appellate Divi-

sion, Fourth Department, in disciplining him promulgated a new rule that participation by lawyers in grouped-by-practice Yellow Pages listings constitutes a *per se* violation of the advertising rules cited in the preceding paragraph. It is submitted, however, that such a reading goes far beyond the ambit of the Appellate Division's decision. While the Appellate Division did point out the potential problems such advertising might pose from the standpoint of public perception of a lawyer's competence, it stopped far short of establishing a *per se* ban on such advertisements. In fact, the Appellate Division specifically recognized the right of attorneys to identify areas of practice in advertisements. *Matter of Zimmerman*, 79 A.D. 2d 263, 265 (4th Dept. 1981). However, the Appellate Division then went on, citing Zimmerman's admitted lack of experience in several of the advertised categories, to state: "If the purpose of the advertisement is to permit a consumer to reach an informed and reliable decision and identify the legal provider for the legal services he desires, which is a legitimate aim, this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed." 79 A.D. 2d at 265. The opinion further stated:

> "Measuring the conduct of respondent against the plain and obvious meaning and intent of the regulation, we conclude that the potential for deception was created by the advertisement and respondent's listings were deceptive and misleading . . . . We hold here that commercial speech must be honest and truthful, and prospective clients should not be beguiled or deceived by the content or the subject matter of the public utterance. Respondent's conduct subverted the true purpose of permitted advertising by lawyers and no prior sanction should be required to insure complete honesty and truthfulness by lawyers in all of their utterances, public or otherwise." 79 A.D. 2d at 266.

The Appellate Division by this language was clearly limiting its holding to Zimmerman, merely applying the relevant advertising standards to the factual situation presented by his conduct, and did not establish a *per se* ban against grouped-by-practice listings. This latter point was specifically noted by the Court of Appeals

(A6 of Zimmerman's appendix to the petition), which found that the Appellate Division had stopped short of promulgating a prohibition on the grouped-by-practice listings.

The Court of Appeals further rejected Zimmerman's contention that the Appellate Division's interpretation and application of the advertising rule constituted promulgation of a new rule (A5 of Zimmerman's appendix to the petition). It is submitted that this holding by the Court of Appeals was correct, as borne out by the above quotations from the Appellate Division opinion which indicate that the latter court's opinion was directed solely at the facts and circumstances of Zimmerman's situation without promulgating a new advertising rule.

Thus Zimmerman's challenge at the District Court level related to his own particular case, and as such was not subject to District Court review. It is submitted therefore, that the case was properly dismissed under the holding of *District of Columbia Court of Appeals v. Feldman*, —U.S.—, 103 S. Ct. 1303 1983. Moreover, in view of the holding in *Feldman*, it is submitted that there is no outstanding important question of law to come before this Court, nor has the Court of Appeals made a pronouncement in conflict with existing authority. Consequently, it is submitted that no ground has been raised to warrant issuance of a writ of certiorari by this Court.

CONCLUSION

The petition for writ of certiorari filed by Petitioner Zimmerman should be denied in all respects.

Dated: May 11, 1984

Respectfully submitted,

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Office - Supreme Court, U.S
FILED
MAY 9 1984
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1983

No. 83-1780

AARON MARK ZIMMERMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS And REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, THE ONONDAGA COUNTY BAR ASSOCIATION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, THE ONONDAGA COUNTY BAR ASSOCIATION

The respondent, The Onondaga County Bar Association, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Second

Circuit's judgment and opinion in this case. That opinion is reported at 726 F.2d 85. *(Zimmerman v. Grievance Com. of Fifth Jud. Dist.)*

Although the petition refers repeatedly to the New York Appellate Division's opinion in this case censuring the petitioner *(Matter of Zimmerman,* 79 AD2d 263), no copy thereof is appended to the petition. We have therefore, for ready reference, reproduced the said opinion at the end of this brief.

The petitioner has misconceived and misstated the "Questions Presented." The actual question is one of jurisdiction, namely: Did the U.S. District Court lack subject-matter jurisdiction. Both the District Court and the U.S. Court of Appeals held that such jurisdiction did not exist, citing the recent decision of this Court in *District of Columbia Court of Appeals v. Feldman,* —U.S.—, 103 S. Ct. 1303.

There are moreover a number of important omissions, and indeed some distortions, in the petitioner's "Statement of the Case," which we shall note below.

STATEMENT OF FACTS

The Appellate Division, Fourth Department, of the New York Supreme Court censured the petitioner because he advertised in the "yellow pages" of the Syracuse telephone directory for the year 1980-1981 that he practiced in each of the 25 areas of law listed in the advertisement appearing under the caption "Lawyers Grouped by Practice." *(Matter of Zimmerman,* 79 AD2d 263) In his written answer to the grievance complaint Mr. Zimmerman admitted that he had no experience whatever in several of the said categories of law practice. The Appellate Division held that his conduct violated the officially promulgated rule

of the court (22 NYCRR 1022.16 [a]) forbidding a lawyer to use or participate in the preparation or dissemination of any public communication containing statements or claims "that are false, deceptive, misleading or cast reflection on the legal profession as a whole." (The entire advertisement is reproduced at page 267 of 79 AD2d. See also last page of appendix to this brief.)

Contrary to the assertion in the petition that the Appellate Division censured Mr. Zimmerman for purchasing listings in the grouped-by-practice section of the yellow pages, the Court explicitly censured him for representing to the public that he practiced in various fields of law wherein he had never practiced.

After an appeal to the New York State Court of Appeals had been dismissed upon the ground that no substantial constitutional question was directly involved (53 NY2d 937), and after denial of a subsequent application for permission to appeal to that Court (54 NY2d 606), Mr. Zimmerman took no step to seek review by the Supreme Court of the United States. This he could have done but instead he commenced an action in the U.S. District Court, Northern District of New York.

The District Court held that it lacked subject-matter jurisdiction, and this determination was unanimously affirmed by the Second Circuit. (726 F.2d 85). Both courts held that the case is governed by *District of Columbia Court of Appeals v. Feldman.* (—U.S.—, 103 S. Ct. 1303)

REASONS WHY THE WRIT SHOULD BE DENIED

As the *Feldman* case demonstrates, the petitioner had a remedy, after the New York courts had finally

determined his case, namely to seek relief from the Supreme Court of the United States. This was his sole remedy and he did not pursue it. He did not have an election at that point to start a new action in the U.S. District Court.

In the next place, there is no basis whatever for the petitioner's claim that the decision of the Appellate Division constituted the promulgation of a new "rule" to which, he says, he is now entitled to make a "general challenge" in the Federal courts. The proceeding in the State court was judicial in nature, adjudging that the pre-existing official rule, dealing with deceptive or misleading advertising by lawyers, had been violated by Mr. Zimmerman. The decision of the Appellate Division, styled a "rule" by Mr. Zimmerman, does not yield itself to such a transformation. This decision formed an integral part of a judicial, not a legislative, proceeding, and constitutes but one of a variety of judicial opinions interpreting and applying, case by case, the official rules relating to advertising by lawyers.

Nor is there any "important constitutional issue." The petitioner is free to advertise in the yellow pages, or elsewhere, as long as the advertisement is not misleading, or false or deceptive.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

MATTER OF ZIMMERMAN [79 AD2d 263]

In the Matter of AARON MARK ZIMMERMAN, an Attorney, Respondent. OFFICE OF GRIEVANCE COMMITTEES, Petitioner.

Fourth Department, February 18, 1981

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Fifth Judicial District. Respondent was admitted to the Bar on September 12, 1977, at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings

An attorney who advertised in the yellow pages of the telephone directory that he practiced in each of the 25 areas of law listed alphabetically violated Disciplinary Rule 2-101(A) of the Code of Professional Responsibility, which provides that a lawyer shall not use or disseminate any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole; the potential for deception was created by the advertisement and respondent attorney's listings were deceptive and misleading. Because of respondent's youth, his disclaimer of any intent to mislead or deceive, and his naiveté in relying on the assurances of the printers of the advertisement as to the propriety of the listings, he should not be disbarred or suspended but should be censured.

APPEARANCES OF COUNSEL

David E. Brennan (Paul J. Ginnelly of counsel), for petitioner.

Sugarman, Wallace, Manheim & Schoenwald (Donald Schoenwald of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to practice as an attorney and counselor at law in the State of New York on September 12, 1977. The Grievance Committee for the Fifth Judicial District charged in its petition instituting this disciplinary proceeding that respondent advertised in the Yellow Pages of the New York Bell Telephone Directory for Syracuse, New York for the year 1980-1981 that he practiced in each of the 25 areas of law listed alphabetically in the advertise-

ment which appeared under the caption "Lawyers Grouped by Practice" and that this conduct appears to violate DR 2-101(A) of the Code of Professional Responsibility and subdivision (a) of rule 1022.16 of the Appellate Division, Fourth Department (22 NYCRR 1022.16[a]). According to the petition, respondent admitted that "he has had no experience at all in several of these categories of law".

By this answer respondent admitted the material allegations of the petition, but denied that he either intended to violate or, in fact, violated the Code of Professional Responsibility. Respondent's answer details the methods adopted by the telephone company in obtaining his listing in the "various categories where he was willing to accept clients who came to him with problems", and asserts that he is associated with a well-established law firm to whom he could turn for assistance and that at the time he purchased the advertisement he did not feel that his conduct was improper. He claims that the guidelines and rules set forth in DR 2-101(A) are "vague, ill-defined", and that he had no intention to mislead or deceive. The parties conceded that no order of reference was required.

We find that respondent violated DR 2-101(A) of the Code of Professional Responsibility and the rules of this department (22 NYCRR 1022.16[a]).

DR 2-101(A) of the Code of Professional Responsibility provides: "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole." Our department rule, effective March 1, 1978 entitled "Advertising by attorneys", is identical to DR 2-101(A).

An examination of the advertisement, a copy of which is attached to the petition and annexed hereto as Appendix A, reveals that its publisher divided the practice of law into 25 separate categories under each of which respondent's name appears first: his name is listed alphabetically by his given name, Aaron, rather than by his surname, Zimmerman. Under the advertisement's caption appears the follow-

ing legend: "Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas than any other lawyers".

Commercial speech in the form of truthful advertising of legal services, designed to disclose information to permit a consumer to reach an informed decision and to identify the legal services he desires, serves individual and societal interests and while it may be regulated by the State it may not be proscribed (*Bates v State Bar of Arizona*, 433 US 350; see, also, *Matter of Primus*, 436 US 412; *Matter of Koffler*, 51 NY2d 140). Further, a lawyer is permitted publicly to identify one or more areas of law in which he practices, but he may not hold himself out as a specialist in a particular field of law, since no lawyer certification procedure or rules have been established in New York State (Code of Professional Responsibility, DR 2-105).

The advertisement itself makes no overt claim as to the quality of legal services that may be provided. The ambiguous caveat or disclaimer of the advertisement together with the description of the various categories of law, however, may leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists or that certification is available. Read as a whole, it cannot be gainsaid that the advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed. If the purpose of the advertisement is to permit a consumer to reach an informed and reliable decision and identify the legal provider for the legal services he desires, which is a legitimate aim, this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed. Respondent's claim that he is associated with a well-established law firm which can assist him is of no avail because it is his listing, not that of his law firm, which is under review. This claim merely emphasizes the deceptive and misleading nature of the entire advertisement since it is he, not his law firm, who is holding himself out to the public.

The disciplinary rule under review is directly concerned with the prevention of deception: a legitimate State interest which the regulation seeks to protect. The thrust of the regulation is honest public communication so that "the stream of commercial information [may] flow cleanly as well as freely" *(Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748, 772). No detailed guideline or signpost other than an innate sense of right or wrong should be necessary to achieve this goal. A lawyer, particularly, should have an awareness of the moral quality of his own conduct and the ability to make the obvious judgment that the design of such an advertisement is to gain clients by guile and delusion. Measuring the conduct of the respondent against the plain and obvious meaning and intent of the regulation, we conclude that the potential for deception was created by the advertisment and respondent's listings were deceptive and misleading. The holding by the Court of Appeals in *Matter of Koffler* (51 NY2d 140, *supra)* does not require a contrary conclusion. There it was held that direct-mail solicitation of potential clients is constitutionally protected commercial speech. We hold here that commercial speech must be honest and truthful, and prospective clients should not be beguiled or deceived by the content or the subject matter of the public utterance. Respondent's conduct subverted the true purpose of permitted advertising by lawyers and no prior sanction should be required to insure complete honesty and truthfulness by lawyers in all of their utterances, public or otherwise, to prospective clients. Because of respondent's youth, his disclaimer of any intent to mislead or deceive, and his naiveté in relying on the assurances of the printers of the advertisement as to the propriety of the listings, he should not be disbarred or suspended but should be censured.

DILLON, P. J., CALLAHAN, DOERR, DENMAN and SCHNEPP, JJ., concur.

Motion to strike paragraph ninth of the petition granted. Order of censure entered.

LAWYERS
Grouped By Practice
Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas than any other lawyers.
Guide

ACCIDENTS-PERSONAL INJURY PROPERTY DAMAGE

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TRIAL PRACTICE

WILLS, TRUST & PROBATE ESTATES

WORKMEN'S COMPENSATION